No. 11015

In the United States Circuit Court of Appeals for the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

LIGHTHOUSE OYSTERS, INC., an Oregon Corporation, APPELLEE

APPELLANT'S BRIEF

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.

FLEMING JAMES, Jr.,
Director, Litigation Division.

DAVID LONDON,
Chief Appellate Branch.

SAMUEL L. COHEN,
Attorney,
Office of Price Administration,
Washington, D. C.

FRANZ WAGNER,
CECELIA GALLAGHER,
Enforcement Attorneys, Portland, Oregon

INDEX

	Page
Jurisdiction	1
Statutes and regulations involved	1
Statement of facts	5
Assignment of errors	8
Argument	9
I. The Administrator was entitled to a recovery for overcharges on sales after November 9, 1943, in which defendant admittedly failed to identify the fish on its invoices by size, grade and style of dressing	12
II. The court erred in allowing two cents a pound credit on all overcharges prior to November 9, 1943	17
Conclusion	19

TABLE OF CASES

Baker & Co. v. *Lagaly*, 144 F. (2d) 344	17
Bowles v. *Case* (CCA 9)—F. (2d) —, May 28, 1945	16
Bowles v. *Meyer* (CCA 4) — F. (2d) —, May 1945	16
Bowles v. *NuWay Laundry*, 144 F. (2d) 741	16
Bowles v. *Willingham*, 321 U. S. 503	13
Caminetti v. *United States*, 242 U. S. 470, 490	14
Daitz Flying Corp. v. *United States*, 8 Fed. Rules Service 1.623	17
Geo. Van Camp & Sons v. *American Can Co.*, 278 U. S. 245, 253	14
Hamilton v. *Rathbone*, 175 U. S. 414, 419	13
King v. *Edward Hines Lumber Co.*, 8 Fed. Rules Service 16.32	17
Lenroot v. *Interstate Bakeries* (CCA 8) 146 F. (2d) 325	16
Rosenweig v. *United States*, 144 F. (2d) 30	16
Taylor v. *United States*	16
Yakus v. *United States*, 321 U. S. 414	16
Statutes:	
Emergency Price Control Act of 1942, 56 Stat. 23 50 U. S. C. App. 901—	
Section 2 (a)	2
Section 2 (g)	2
Section 4 (a)	2
Section 205 (e)	2
Maximum Price Regulation No. 418, 8 F. R. 9366—	
Section 1	2
Section 7a	3
Section 13 (a)	4
Section 13 (c)	5
Statement of considerations	9

656049—45——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11015

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

LIGHTHOUSE OYSTERS, INC., an Oregon Corporation, APPELLEE

APPELLANT'S BRIEF

JURISDICTION

This is an appeal by the Price Administrator from a judgment in his favor for the sum of $252.59, entered in the United States District Court for the District of Oregon on December 11, 1944. The action was brought pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 50 U. S. C. App. Sec. 925 (e)), hereinafter called "the Act." Notice of appeal was filed on February 24, 1945 (R. 15). Jurisdiction of the District Court was invoked under Section 205 (c) of the Act and jurisdiction of this court is invoked under Section 128 of the Judicial Code (28 U. S. C. 225).

STATUTES AND REGULATIONS INVOLVED

The action involves the Emergency Price Control Act of 1942, as amended, and Maximum Price Regu-

lation No. 418, as amended, issued thereunder. The pertinent sections of the Act are Sections 2 (a), 2 (g), 4 (a), and 205 (e). Section 2 (a) authorizes the Price Administrator by order or regulation to establish such maximum price or prices for the sale of commodities as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. Section 2 (g) authorizes the Administrator to include in said regulations such provisions as he deems necessary to prevent the circumvention or evasion thereof. Section 4 (a) makes it unlawful to sell or deliver any commodity, or to do or omit to do any act, in violation of any regulation or order issued under Section 2. Section 205 (e) authorizes suits for three times the amount of the overcharge against any person who has sold a commodity at a price in violation of the regulation and gives that right of action to the Administrator under the facts and circumstances of this case.

Maximum Price Regulation No. 418 (8 F. R. 9366), establishing maximum prices for fresh fish and sea food, was issued pursuant to Section 2 of the Act on July 7, 1943, effective July 13, 1943. Section 1 thereof reads as follows:

> *What this regulation does.*—This regulation fixes the maximum prices at which producers and wholesalers may sell fresh fish and seafood. On and after July 13, 1943, the date this regulation takes effect, no producer or wholesaler may sell or deliver any fresh fish or seafood, and no person in the course of trade or business may buy or receive any fresh fish or seafood from a producer or wholesaler at prices higher

than the prices fixed by this regulation. But prices lower than those fixed may be charged or paid.

Section 7 (a), as originally promulgated, read as follows:

> *Allowance for transportation*—(a) *When a wholesaler may add his transportation cost to listed prices.*—The prices set forth in section 20 list maximum prices for sales by a retailer-owned cooperative, cash and carry, and service and delivery wholesaler, exclusive of container costs and transportation costs incurred in transporting the fish to his established place of doing business. Where such transportation charges have been incurred (excluding local trucking and hauling charges), a wholesaler may add to the maximum prices the actual cost of transportation from the primary fish shipper wholesaler's established place of doing business to his customary receiving point.[1]

On August 4, 1943, this section was amended by Amendment No. 3 (8 F. R. 10, 939) effective the same date, to read as follows:

> Sec. 7 (a) *When a wholesaler may add his transportation cost to listed prices.*—The prices set forth in section 20 list maximum prices for sales by a retailer-owned cooperative, cash and carry, and service and delivery wholesaler, exclusive of container costs and transportation costs incurred in transporting the fish to his established place of doing business. Where such transportation charges have been incurred (excluding local trucking and handling

[1] By amendment No. 32 (9 F. R. 6452) Sections 6 to 20, inclusive, were redesignated Sections 8 to 22, inclusive.

charges), a wholesaler who purchases fresh fish and seafood from a primary fish shipper wholesaler may add to the maximum prices the actual cost of transportation from the primary fish shipper wholesaler's established place of doing business to such wholesaler's customary receiving point, and must record the allowed transportation cost in an invoice to his customer. Any customer of such wholesaler may add to his selling price the transportation cost as shown in the invoice. Where a primary fish shipper wholesaler has a branch warehouse located at a remote point from the market of origin to which it ships fresh fish and seafood, the branch warehouse for the purpose of transportation allowance may be considered a wholesaler who purchases fresh fish and seafood from a primary fish shipper wholesaler. In no instance may transportation costs exceed common carrier rates when such rates are available.[1]

Section 13 (a) reads as follows:

Records and reports.—(a) Every person making a sale subject to this regulation and every person in the course of trade or business making a purchase of fresh fish or seafood, subject to this regulation, or otherwise dealing therein, after July 12, 1943, shall keep for inspection by the Office of Price Administration, for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, accurate records of each such purchase or sale, showing the date thereof, the name and address of the buyer and of the seller, the price con-

[1] By amendment No. 32 (9 F. R. 6452) Sections 6 to 20, inclusive, were redesignated Sections 8 to 22, inclusive.

tracted for or received, the quantity, species, grade, style of dressing of pack of fresh fish or seafood, and the container type and size.[1]

By Amendment No. 4 issued August 23, 1943, effective August 25, 1943 (8 F. R. 11734), Section 13 (c) was added to the regulation, which reads as follows:

> (c) Every person making a sale of any fresh fish or seafood subject to this regulation shall furnish to the purchaser at the time of delivery a written statement setting forth the date; the name and address of the buyer and seller; the species sold; the quantity, sizes, grades, and styles of dressing of fresh fish and seafood, and the price charged therefor, including a separate statement of the container cost, if any, as provided in section 19, and transportation cost, if any, as provided in section 7.[1]

On November 3, 1943 Section 13 (c) was further amended to be effective November 9, 1943 (8 F. R. 15257) by adding the following:

> If the statement furnished a purchaser at the time of delivery does not identify the size, grade and style of dressing, the maximum price which may be charged for the fresh fish and seafood involved in the sale is the maximum price for the lowest priced size, grade and style of dressing of the species of fresh fish and seafood sold: *Provided,* That this paragraph shall not apply to any sales made at prices listed in Table A in section 20.[1]

STATEMENT OF FACTS

The complaint (R. 2), filed on April 28, 1944, charged that the defendant had, since July 13, 1943,

[1] By amendment No. 32 (9 F. R. 6452) Sections 6 to 20, inclusive, were redesignated Sections 8 to 22, inclusive.

sold and delivered fresh fish and seafood at prices higher than the maximum prices established by the regulation and its amendments. In his complaint the Administrator had computed these overcharges to be $3,150.58 and prayed judgment for $9,451.74, three times the amount of the overcharges. At the trial the Administrator conceded that as a result of a recheck the amount of the overcharges was the sum of $2,047.49. (R. 45.)

Following a pretrial conference, the District Court entered a pretrial order (R. 6–11), by which it was ordered "that the following facts shall be considered as admitted and established." Between August 5, 1943 and December 31, 1943 defendant sold fish and seafood generally known as Chinook silvers and salmon at the prices set forth in pretrial Exhibit 1. It was admitted that these sales "were subject to the ceiling prices established by Maximum Price Regulation No. 418 as amended" and that "plaintiff's pretrial Exhibit 3 is a table of prices for the species of fresh fish listed in column III of plaintiff's pretrial Exhibit 1, taken from table E of Maximum Price Regulation 418, as amended, and represents the correct maximum prices for those species, sizes and types of dress listed in plaintiff's pretrial Exhibit 3. Defendant did not specify in his invoices the sizes, grades and styles of dress of the fresh fish he sold, as he is required to do by Section 13 (b) [c] [2] of the Regulation. That as the statement furnished the purchaser at the time of delivery did not identify the size, grade and style of dressing, the maximum price which may

[2] The pretrial order erroneously refers to Sec. 13 (b).

be charged for the fresh fish involved in the sale after November 3, 1943 is the maximum price for the lowest priced size, grade and style of dressing of the species of fresh fish sold."

Notwithstanding the foregoing admission and order, the court failed to give effect to Section 13 (c) of the Regulation, and refused to allow any recovery for sales after November 9, 1943, on which the invoices failed to identify the size, grade, and style of fish sold.

Section 7 of the regulation [3] allows a wholesaler to add to his maximum price the actual cost of transportation from the primary fish shipper wholesaler's established place of business to his customary receiving point. Plaintiff's pretrial exhibit 2, the correctness of which was admitted and established by the pretrial order, shows the amount paid by defendant for boxing, freight, and tax *all* fresh fish of the type listed on pretrial exhibit 1 and bought by defendant between August 5 and December 31, 1943. The calculations submitted by the Administrator to determine the amount of the overcharges on the sales involved herein gave the defendant credit for all these charges (R. 11, 44, 74–77), but still left overcharges in the sum of $2,047.49. Notwithstanding that the defendant had already been given credit for these sums, the court again gave the defendant credit for these same items by an arbitrary allowance of 2 cents per pound and adding it to its maximum price (Finding 4, R. 13–14).

[3] By Amendment No. 32 (9 F. R. 6452) Sections 6 to 20, inclusive, were redesignated Sections 8 to 22, inclusive.

656049—45——2

Upon the foregoing pretrial order and testimony taken at the trial, the court made the following findings of fact (R. 13):

> 1. That the total alleged overcharges claimed (single damages) amount to $2,047.49.
>
> 2. That the total alleged overcharges prior to November 9, 1943, are in the sum of $974.49, and the total alleged overcharges subsequent to November 9, 1943, are in the sum of $1,073.00.
>
> 3. That the defendant has overcharged as alleged in the complaint and as is indicated on plaintiff's exhibit "1" prior to November 9, 1943.
>
> 4. That the defendant is entitled to a credit of $0.02 per pound as a set-off against said overcharges prior to November 9, 1943.

The only reason given by the court for disallowing a recovery for overcharges on sales made after November 9, 1943, are contained in its "Memorandum of Decision" (R. 12), reading as follows: "I do not agree with plaintiff's interpretation of the amendment dated November 9, and for that reason do not allow recovery after that date." Accordingly, by eliminating any recovery for sales made after November 9, 1943, and giving the defendant the additional credit of $0.02 per pound for freight and tax on all sales made prior to November 9, 1943, the court ordered judgment for the Administrator for the sum of only $252.59. The appeal was taken from that judgment.

ASSIGNMENT OF ERRORS

1. The District Court erred in failing to allow a recovery for overcharges on sales made by the defend-

ant after November 9, 1943, and on which sales the statements furnished to the respective purchasers did not identify the fish by size, grade and style of dressing.

2. That the District Court erred in failing to conclude as a matter of law that each and all of the sales made by appellee subsequent to November 9, 1943, were made at prices in excess of the maximum prices established by Maximum Price Regulation No. 418, as amended, and in failing to conclude that the overcharges on such sales are in the sum of $1,073.00.

3. That the District Court erred in finding that the defendant is entitled to an additional credit of $0.02 per pound as a set-off against the overcharges made prior to November 9, 1943.

ARGUMENT

Though the enforcement of all Maximum Price Regulations are important to achieve the over-all purposes of the Emergency Price Control Act, we are here concerned with a regulation which has extremely great significance today because of the existing meat shortage. In his Statement of Considerations filed with the Federal Register at the time he originally issued MPR No. 418, the Administrator said:

> *Necessity for the Regulation:* Fresh fish and seafood are among the major items that figure in the cost of living that heretofore have been exempt from price control. In the General Maximum Price Regulation fish were exempt, except for the processed items, along with agricultural products. The highly fluctuating na-

ture of the industry, its seasonal features, and the high perishability of fish in general, make price control difficult. Then, too, price control must be interlocked with allocation, and this has brought about interdepartmental problems that have taken time and effort to work out. In spite of the hazards, the Office of Price Administration has been compelled to place fresh fish and seafood in the price control program. With the ever increasing demand for fresh fish in the absence of a supply of meat sufficient to meet the demand, prices of fresh fish and seafood have spiralled to an unprecedented high. Stabilization of the cost of living imperatively requires the imposition of controls to reduce these prices.

* * * * *

Current Price History: During the last ten years production of fish in the United States has varied from 2,600,000,000 to 4,900,000,000 pounds per year, the low point coming in 1932 and the high point in 1941. The 1941 production was the highest in the history of the fish industry. The 1942 production of all species of fish and shellfish, however, showed a sharp decline, which is estimated at 3,800,000,000 pounds. A recent estimate of 1943 production has been placed at about 3,650,000,000 pounds.

It is quite evident that production has been on a steady decline since 1941, chiefly due to the war conditions and restrictions.

Demand for fish, on the other hand, has increased during this war due to shortages of other food products. This increased demand continued strongly at the beginning of 1943, and it appears that the demand will exceed

the supply probably for the duration. Shortages of boats and labor and war restrictions on customary fishing grounds make it very unlikely that we will attain any appreciable amount of increased production in the coming years.

In the face of shortage of supply, prices of fish have increased during 1942 and especially 1943, and are now definitely regarded as inflationary. This inflationary price trend has been due to fish shortage as well as to the fact that during the period of general price control fresh fish prices have remained uncontrolled. Historically, prices paid to fishermen for all species of fish have varied somewhat from year to year. The average price for the major species of fish landed at Boston was $2.79 per 100 pounds in 1939, $3.45 per 100 pounds in 1940, $3.85 per 100 pounds in 1941, and $6.45 per 100 pounds in 1942.

Maximum prices for sales by producers established by the regulation represent average 1942 prices with necessary adjustments to maintain proper differentials between species.

During the first quarter of 1943 fresh fish prices to the fishermen have increased about 55% over the prices of the same period in 1942. In January the average for the major species of fish landed in Boston was $15.03 per 100 pounds, in February it was $15.62 per 100 pounds, and in March it was $16.66 per 100 pounds. In view of this inflationary trend price control of fresh fish becomes mandatory.

The need for the amendment which added Section 13 (c) to the Regulation requiring invoices to specify the size, grade and style of dressing (p. 5, *supra*)

is apparent when it is realized that the maximum prices for salmon range from 11½¢ per pound to 33¢ per pound (R. 40). Unless the information required by this section is available and supplied, neither the purchaser nor the Administrator can determine whether there has been an overcharge.

I

The Administrator was entitled to a recovery for overcharges on sales after November 9, 1943, in which defendant admittedly failed to identify the fish on its invoices by size, grade, and style of dressing

By the pretrial order (IV, R. 7–8) it was established that Column III of Exhibit 1 truly reflected the "species and amount of fish sold and the prices charged therefor." Section VII of the pretrial order (R. 9) finds that pretrial Exhibit 3 truly "represents the correct maximum prices for those species, sizes, and types of dress" involved herein. These were the figures used by the Administrator in determining that the total amount of the overcharges was in the sum of $2,047.90 (R. 41–45). This calculation was adopted by the court in Finding #1 (R. 13). The uncontradicted evidence establishes, and the pretrial order finds, that defendant did not specify in his invoices the sizes, grades, and style of dress of the fresh fish sold, as it was required to do by Section 13 (b) [c][1] of the regulation.[2] Based on this finding,

[1] The pretrial order erroneously mentions Sec. 13 (b).

[2] Even before Sec. 13 (c) was added to the regulation, it always required that defendant keep records showing the size, grade, and style of dressing. The defendant did not comply with this requirement (R. 24, 41–2).

the court in said pretrial order, correctly concluded that as the statement furnished the purchaser at the time of delivery did not identify the size, grade, and style of dressing, the maximum price which may be charged for the fresh fish involved in the sales after November 3, 1943, is the maximum price for the lowest priced size, grade, and style of dressing of the species of fresh fish sold. The Administrator therefore contends that on this state of the record the court was required to order a recovery on all sales made after November 9, 1943. The only reason given by the court for not ordering a recovery on these sales was that it did "not agree with plaintiff's interpretation of the amendment dated November 9" (R. 12). There was, however, no problem of interpretation or construction before the court. The province of construction and interpretation lies wholly within the domain of ambiguity (*Hamilton* v. *Rathbone,* 175 U. S. 414, 419) and there is no ambiguity in the regulation involved herein. The amendment unequivocally and unambiguously provides "if the statement furnished a purchaser at the time of delivery does not identify the size, grade, and style of dressing, the maximum price which may be charged for the fresh fish and seafood involved in the sale is the maximum price for the lowest-priced size, grade, and style of dressing of the species of fresh fish and seafood sold" (p. 5, *supra*).

The regulation and its amendment are an exercise of the legislative power of Congress (*Bowles* v. *Willingham,* 321 U. S. 503) and the courts must give the same effect thereto as though the regulation itself

were enacted by Congress. The Supreme Court has repeatedly held that where the language of a statute is clear and is not inconsistent with the purpose for which it was enacted, it is the duty of the courts to give effect thereto. In such cases the function of the court is to enforce the legislative language and there is nothing to construe. In *Caminetti* v. *United States,* 242 U. S. 470, 490, the court said:

> It is elementary that the meaning of a statue must, in the first instance, be sought in the language in which the Act is framed, and if that is plain and the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the court is to enforce it according to its terms.

The same rule was stated in *Geo. Van Camp & Sons* v. *American Can Co.,* 278 U. S. 245, 253, in the following language:

> The words being clear, they are decisive. There is nothing to construe. To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger in the one case of converting what was meant to be open and precise into a concealed trap for the unsuspecting or, in the other, of relieving from the grasp of the statute some whom the legislature definitely intended to include.

But, assuming arguendo, that the purpose and intent of the Administrator was in doubt, so that a judicial inquiry to determine that intent were permissible, there is evidence available that he intended exactly what he expressly wrote in the amendment. Section 2 (a) of the Act requires the Administrator

to issue with each regulation "a statement of the considerations involved in the issuance of such regulation or order." Such a statement may well be deemed to establish the so-called "legislative history" of the regulation or amendment and may, in doubtful cases be referred to in determining such legislative intent. In the Statement of Considerations filed with the Federal Register contemporaneously with the amendment itself, the Administrator said:

> In the case of many species, size, grade and style of dressing make substantial differences in the price which may be charged. A statement accompanying delivery which merely sets forth the name of the species, without stating the size, grade or style of dressing, is a wholly inadequate record either for the immediate protection of the buyer or for subsequent investigation. Accordingly the accompanying amendment provides that if the seller fails to include on the required statement the size, grade and style of dressing, he may not lawfully charge more than the maximum price specified for the lowest price size, grade or style of dressing of that species.

It is clear beyond the peradventure of a doubt that where the merchant fails to include in the required statement the information demanded by the amendment "he may not lawfully charge more than the maximum price specified for the lowest priced size, grade, or style of dressing of that species."

What the court did in the instant case was not to construe or interpret the amendment. It simply

failed to give it effect. If there was any doubt in the court's mind as to the validity of the regulation, an inquiry into that subject and a determination thereof was expressly withdrawn from its jurisdiction by Section 204 (d) of the Act, which places exclusive jurisdiction to determine such validity in the Emergency Court of Appeals. *Yakus* v. *United States,* 321 U. S. 414, *Bowles* v. *Willingham,* 321 U. S. 503; *Rosensweig* v. *United States* (C. C. A. 9) 144 F. (2d) 30; *Taylor* v. *United States,* 142 F. (2d) 808; *Bowles* v. *Case* (C. C. A. 9) — F. (2d) —, May 28, 1945.

It may perhaps be that equitable considerations prompted the court to deny the relief which the Administrator demanded with respect to these sales, but the action here is one at law and equitable considerations can have no part in determining liability on the part of the defendant. Even where the Administrator has asked for equitable relief against a violator under Section 205 (a) of the Act, it has repeatedly been held that the question of the reasonableness or the alleged harshness of a regulation or its impact on a defendant are not factors to be taken into consideration in determining whether or not such equitable relief should be granted under this war-emergency legislation. *Bowles* v. *Nu Way Laundry* (C. C. A. 10) 144 F. (2d) 741; *Bowles* v. *Meyer* (C. C. A. 4) — F. (2d) —, May, 1945. See also *Lenroot* v. *Interstate Bakeries* (C. C. A. 8) 146 F. (2d) 325.

It is respectfully submitted that the court erred in denying a recovery on overcharges occurring after November 9, 1943.

II

The court erred in allowing two cents a pound credit on all overcharges prior to November 9, 1943

Section 7 of the Regulation, as amended by Amendment No. 3 (p. 3, *supra*), provides that the actual transportation costs incurred in transporting the fish to the wholesaler's place of business, not to exceed common carrier rates, may be added to the maximum prices. In addition, Amendment 7 of September 2, 1943, 8 F. R. 12233, authorizes the State Privilege Tax to be added when paid. Pretrial Exhibit 2 (R. 37–39), admitted in evidence (R. 35), was conceded by Paragraph V of the pretrial order (R. 8–9) to be a full, true, and complete summary of the purchase invoices showing the amount of the transportation costs incurred and Privilege Tax actually paid by defendant. It was not disputed nor made an issue in the case. The amount of these charges must therefore be considered as conclusively established in the amount described in said Pretrial Exhibit 2. *Baker & Co.* v. *Lagaly* (C. C. A. 10th) 144 F. (2d) 344; *King* v. *Edward Hines Lumber Co.* (Apr. 1945) U. S. Dist. Ct. D. Oregon, 8 Fed. Rules Service 16.32; *Daitz Flying Corp.* v. *U. S.* (Dist. Ct. E. D. N. Y. March 8, 1945), 8 Fed. Rules Service 16.23.

The Administrator in his analysis and summary of overcharges, the accuracy of which is not challenged, gave credit to the defendant for transportation charges incurred and State Privilege Tax paid (R. 44). These were determined by an examination of defendant's purchase invoices (R. 8). The evidence discloses

that $2,047.49 was the total amount of the overcharges *after* allowance for Privilege Tax, box charges and freight charges (R. 44–45). The Court allowed two cents a pound in addition. By doing so, the Court gave the defendant credit twice for these charges—once by adopting the analysis submitted by the Administrator and again, by specifically allowing two cents a pound credit. It is obvious that it was error to do so.

Assuming arguendo that this question was in issue, the evidence to sustain a two cents credit per pound was conjectural, uncertain and speculative. The evidence of the appellee was to the effect that freight and tax on 90% of the total amount of his fish was incurred, except the purchases during the Celilo run, which totaled 23,243 pounds. (Exhibit 2, R. 39). The total purchases on which such charges were actually incurred as shown by Exhibit 2 (R. 39) was 44,856 pounds. Nowhere does the defendant show that the amount actually incurred and paid was in excess of the amounts as shown on his purchase invoices as disclosed by Exhibit 2. The evidence on the part of the defendant was vague, uncertain and speculative and could not sustain the set-off allowed by the Court. Furthermore, Section 7 (a) of the Regulation provides that these transportation costs *may be added only when such added transportation cost is shown on the invoice.* The defendant admittedly did not show such items on its invoices and it is, therefore, not entitled to add the cost thereof to its maximum price.

CONCLUSION

It is respectfully submitted that the Court erred in denying a recovery for overcharge on sales after November 9, 1943, and in allowing an additional two cents credit for transportation costs and privilege tax. The judgment should therefore be reversed.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.
FLEMING JAMES, JR.,
Director, Litigation Division.
DAVID LONDON,
Chief, Appellate Branch.
SAMUEL L. COHEN, *Attorney,*
Office of Price Administration,
Washington, D. C.

FRANZ WAGNER,
CECELIA GALLAGHER,
Enforcement Attorneys, Portland, Oregon.

U. S. GOVERNMENT PRINTING OFFICE: 1948